Filed 5/19/09 P. v. Acosta CA2/7

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. HUGO ACOSTA, Defendant and Appellant.	B207466 (Los Angeles County Super. Ct. No. BA332946)

APPEAL from a judgment of the Superior Court of Los Angeles County, Carol H. Rehm, Jr., Judge. Affirmed.

Robert H. Pourvali, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Susan Sullivan Pithey and Nima Razfar, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Defendant Hugo Acosta appeals from a judgment of conviction entered after a jury found him guilty of first degree burglary (Pen. Code, § 459) and felony vandalism (*id*., § 594, subd. (a)). Following his conviction, defendant admitted a prior serious felony conviction (*id*., §§ 667, subds. (a), (b)-(i), 1170.12), and the trial court sentenced him to the low term of two years, doubled as a second strike, plus an additional five years for the prior serious felony conviction, for a total of nine years in state prison.

Defendant contends there is insufficient evidence to support his conviction, the trial court instructed the jury incorrectly, and the trial court abused its discretion in refusing to strike his prior conviction. We disagree and affirm.

FACTS

Defendant and his sister, Veronica Acosta (Veronica) lived in El Sereno with their father. Veronica had her own room in the house; she had a lock on her door and did not allow anyone to enter her room without permission. Veronica painted pop art and portraits. She kept most of her artwork in her room.

On the evening of November 28, 2007, defendant and Veronica got into an argument. Defendant told her that she was not an artist. He grabbed one of her paintings off of the living room wall, threw it on the floor, stomped on it, and then took it outside and threw it in the trash can. Veronica was shocked and asked defendant, "Why would you do that? I would never ever do that to any of your belongings." She told defendant she was going to call the police and called 911. Defendant left. When the police arrived, her father and aunt pressured her not to press charges against defendant, and she agreed. Defendant did not return home that night.

Veronica left the house to go to work early the next morning in order to avoid encountering defendant. She worked for her other brother, Enrique Acosta (Henry), helping to care for his children. Before leaving, she made sure her windows were closed

and her door was locked, because she was worried that defendant might try to go into her room.

About 6:00 a.m., she received several calls on her cell phone. She believed they were from defendant and did not answer them. About 6:30 a.m., defendant called Henry. He told Henry to tell Veronica not to come home. He added that if Veronica was going to tell their family he was crazy, he would show her he was crazy. He put the telephone down but did not hang up. Henry heard the sounds of things breaking and tearing. Veronica called the police.

Veronica returned home, where she met the police. They went into her room. Seven paintings from her walls and one from her easel were slashed and destroyed. Her books and clothing were strewn about. Her computer had been thrown on the floor and destroyed. Her air conditioner had been removed from the window and was on the floor.

The police arrested defendant that afternoon. Los Angeles Police Detective Luz Rodriguez spoke to him at the station. He gave the following statement: "In the evening of [November 28, 2007], my sister and myself were arguing about one of her paintings. Then she got into my personal things, me not having a job. I got her painting and threw it outside. Then she asked me to leave because she said she felt threatened by me. I went and returned the next day, the 29th of November. I found that she took something personal of mine and destroyed it. So I went into her room and cut her paintings."

Veronica estimated the damage to her paintings to be about $30,000. She explained that each painting took one to six months to paint. She had received offers for some of her paintings, about $5,000 for one and about $8,000 each for two others.[1]

The value of the canvasses themselves was $50 to $120. The paints and brushes used to paint the pictures cost about $1,180. The destroyed computer had cost her about $1,000.

---

[1] Photographs of the damaged paintings were admitted into evidence.

DISCUSSION

A. *Sufficiency of the Evidence to Support Felony Vandalism Conviction*

Vandalism is a felony if the value of the property destroyed is $400 or more. If the value is less than $400, vandalism is a misdemeanor. (Pen. Code, § 594.) Defendant contends the evidence is insufficient to support his felony vandalism conviction, in that there was no competent evidence to establish the value of the paintings.

In reviewing the sufficiency of the evidence, the question on appeal is whether there is evidence from which a reasonable trier of fact could have found the prosecution sustained its burden of proving the defendant guilty beyond a reasonable doubt. (*People v. Hill* (1998) 17 Cal.4th 800, 848-849.) "In making this determination, we '"must view the evidence in a light most favorable to respondent and presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence."'" (*People v. Rayford* (1994) 9 Cal.4th 1, 23; accord, *People v. Cuevas* (1995) 12 Cal.4th 252, 260-261.) We also must examine the entire record, not merely '"'"isolated bits of evidence."'" (*Cuevas, supra,* at p. 261.)

Substantial evidence is that which is reasonable, credible and of solid value. (*People v. Bradford* (1997) 15 Cal.4th 1229, 1329.) Matters of credibility of witnesses and weight of the evidence are "'the exclusive province'" of the trier of fact. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) A reviewing court cannot substitute its evaluation of a witness's credibility for that of the trier of fact. (*Ibid.*)

Defendant poses several reasons why Veronica's testimony was insufficient to support the finding that her paintings were worth more than $400. First, he asserts that the value of property is fair market value, not the value of the property to the victim, citing *People v. Swanson* (1983) 142 Cal.App.3d 104, 107; *People v. Pena* (1977) 68 Cal.App.3d 100, 102-104; and *People v. Renfro* (1967) 250 Cal.App.2d 921, 924.

While defendant's statement of the law is accurate, the cases he cites are of no assistance here. *Swanson* and *Pena* involved thefts from retail stores, where retail cost was held to be the fair market value of the stolen items. *Renfro* involved cable stolen

from a telephone company service yard; testimony as to the replacement cost provided evidence as to fair market value.

Veronica did not testify as to the value of the paintings to her. She testified as to the value of the materials used in the paintings, the time she put into painting them, and the amount of offers she received for them. Additionally, the jury was able to view photographs of the paintings. From this evidence, the jury could determine the fair market value of the paintings.

Defendant also claims that Veronica's testimony was not credible and therefore could not provide sufficient evidence as to the value of the paintings. He points out that Veronica had never sold a painting and did not work as a painter. He adds that there was no "evidence to show that Veronica was an accomplished artist, or that her paintings would have reasonably commanded any significant price in the market."

As the People point out, "[t]he opinion of an owner of personal property is in itself competent evidence of the value of that property, and sufficient to support a judgment based on that value. [Citations.] 'The credit and weight to be given such evidence and its effect . . . is for the trier of fact.'" (*Schroeder v. Auto Driveaway Co.* (1974) 11 Cal.3d 908, 921; see also *People v. Coleman* (1963) 222 Cal.App.2d 358, 361; *People v. Haney* (1932) 126 Cal.App. 473, 475.)[2]

Defendant analogizes to cases involving damages for lost profits. Where it is a new business involved, "'[t]he award of damages for loss of profits depends upon whether there is a satisfactory basis for estimating what the probable earnings would have been had there been no tort.'" (*Kids' Universe v. In2Labs* (2002) 95 Cal.App.4th 870,

---

[2] The trial court instructed the jury pursuant to CALCRIM No. 1860: "A witness gave her opinion of the value of the property she allegedly owned. In considering the opinion, you may but are not required to accept it as true or correct. Consider the reasons the witness gave for any opinion, the facts or information on which she relied in forming that opinion, and whether the information on which the witness relied was true and accurate. You may disregard all or any part of an opinion that you find unbelievable or unreasonable. You may give the opinion whatever weight, if any, you believe it deserves."

883.) Here, Veronica provided a basis for estimating the value of her paintings—the amounts she had been offered for some of her paintings. The evidence was sufficient to establish that the value of the destroyed property was $400 or more, making the crime of vandalism a felony.

Defendant argues that there is insufficient evidence that he entered Veronica's room with the intent to commit vandalism in the amount of $400 or more. Defendant's argument rests on the assumption that there is insufficient evidence to establish the value of Veronica's paintings at $400 or more. Since the evidence is sufficient, defendant's argument fails.

B. ***Instruction on the Target Felony***

Defendant challenges the trial court's instruction to the jury in response to a question they posed regarding the relationship between the requisite intent and the dollar amount of the vandalism.

The trial court initially instructed the jury regarding the union of act and wrongful intent. As to burglary, it instructed the jury that burglary requires the defendant commit the prohibited act and do so with a specific intent, which would be explained in the instruction for that crime. (CALCRIM No. 252.)

The trial court then instructed the jury that in order to prove defendant guilty of burglary, the People were required to prove that "defendant entered a room within a building," and when he did so, "he intended to commit vandalism in destroying property, not his own, worth $400.00 or more." (CALCRIM No. 1700.) It instructed the jury as to the elements of vandalism (CALCRIM No. 2900), and that once they found defendant guilty of vandalism, they had to decide whether the People "proved that the amount of damage caused by the vandalism was $400 or more" (CALCRIM No. 2901). The court also instructed the jury as to the lesser offense of misdemeanor vandalism. (CALCRIM No. 3517.)

During deliberations, the jury requested "clarification on the meaning of intent." It also asked the court: "Does a dollar amount factor into the defendant's intent?"

In discussing the jury's questions, the prosecution took the position that defendant merely had to intend to commit vandalism in order to be convicted of burglary. The defense took the position defendant had to intend to commit vandalism causing $400 or more in damages, i.e., a felony, before he could be convicted of burglary. Defense counsel requested that the trial court read a special instruction she had prepared or, in the alternative, reread all instructions as to specific and general intent. The court suggested rereading CALCRIM Nos. 252, 1700 and 2900, but defense counsel took the position that would be instructional error, stating "if the instructions are read in a vacuum, that that would really do a disservice to the jury's understanding of specific intent instructions, especially considering what their question really is regarding specific intent as it applies to the first degree residential burglary instruction in this case." The trial court proceeded to reinstruct the jury with CALCRIM Nos. 252, 1700 and 2900.

From these three instructions, defendant selects three sentences to support his claim of error: "A burglary was committed if the defendant entered with the intent to commit vandalism. The defendant does not need to have actually committed vandalism as long as he entered with the intent to do so. The People do not have to prove that the defendant actually committed vandalism." (CALCRIM No. 1700.)

Defendant asserts that the instruction was erroneous, in that it omitted "any reference to the amount of damage." Defendant neglects to mention that prior to the selected portion of the instructions, the trial court instructed the jury that "[t]o prove that the defendant is guilty of [burglary], the People must prove that, one, the defendant entered a room within a building and, two, when he entered a room within a building, he intended to commit vandalism and destroy property, not his own, worth $400 or more." (CALCRIM No. 1700.)

When reviewing the effect of a challenged instruction, we look at the instructions given as a whole. (*People v. Cain* (1995) 10 Cal.4th 1, 36; *People v. Garrison* (1989) 47 Cal.3d 746, 780.) We determine whether a reasonable jury would have interpreted the instruction in the manner proposed by defendant. (*Cain, supra*, at p. 36; *People v. Warren* (1988) 45 Cal.3d 471, 487.)

Looking at the instructions given here *as a whole*, it is not reasonably probable that the jury would have focused on the portion selected by defendant to conclude that they did not have to find defendant intended to commit vandalism of property worth $400 or more. CALCRIM No. 1700, from which the selected portion was taken, also specifies that defendant must have had the intent to commit vandalism of property worth $400 or more. Consequently, we find no error in the trial court's reinstruction of the jury.

C. *Refusal to Strike Defendant's Prior Conviction*

When a defendant is sentenced under the "Three Strikes" Law (Pen. Code, §§ 667, subds. (b)-(i), 1170.12), the sentencing court retains the discretion under Penal Code section 1385, subdivision (a), to strike the prior convictions on its own motion in the interests of justice. (*People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 504, 529-530.) Because a decision to strike or not to strike prior convictions lies within the discretion of the trial court, we cannot reverse that decision except for an abuse of discretion. (*Ibid*.)

The abuse of discretion standard is a deferential one. (*People v. Williams* (1998) 17 Cal.4th 148, 162.) The question is whether the trial court's action "'falls outside the bounds of reason' under the applicable law and the relevant facts." (*Ibid*.) That is, whether the trial court's action is one which would not have been taken by a reasonable judge (*People v. Superior Court (Romero)*, *supra*, 13 Cal.4th at pp. 530-531) or the trial court has acted "in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice" (*People v. Jordan* (1986) 42 Cal.3d 308, 316).

Additionally, "'[t]he burden is on the party attacking the sentence to clearly show that the sentencing decision was irrational or arbitrary. [Citation.] In the absence of such a showing, the trial court is presumed to have acted to achieve legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will not be set aside on review.' [Citation.] Concomitantly, '[a] decision will not be reversed merely because reasonable people might disagree. "An appellate tribunal is neither authorized nor warranted in substituting its judgment for the judgment of the trial judge."

[Citations.]' [Citation.]" (*People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 977-978.)

In deciding whether to dismiss prior convictions under Penal Code section 1385, subdivision (a), the trial court must consider the defendant's background, the nature of his current offense and other individualized considerations (*People v. Superior Court (Romero), supra*, 13 Cal.4th at p. 531; *People v. Dent* (1995) 38 Cal.App.4th 1726, 1731), including all of the relevant factors, both aggravating and mitigating (*People v. Tatlis* (1991) 230 Cal.App.3d 1266, 1274; see *People v. Jordan*, *supra*, 42 Cal.3d at p. 318). It must determine whether, in light of defendant's present and past offenses, "and the particulars of his background, character, and prospects, the defendant may be deemed outside the ['Three Strikes'] scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies." (*People v. Williams, supra,* 17 Cal.4th at p. 161.)

Defendant's prior conviction was a 1999 conviction for making criminal threats (Pen. Code, § 422.) Defendant requested that the court strike it, arguing that since that conviction, he "has only had one offense which is a DUI in 2001." Additionally, he was 45 years old, had expressed interest in becoming a counselor, and had taken classes and drug counseling while in prison.

In sentencing defendant, the trial court first observed that defendant had some anger management problems and was lucky these problems had not gotten him into more serious trouble. It noted that it was required to consider the guidance provided by *People v. Superior Court (Romero), supra*, 13 Cal.4th at page 531 and *People v. Williams*, *supra*, 17 Cal.4th at page 161. It also observed that under *People v. Garcia* (1999) 20 Cal.4th 490, 501, "'[w]hile a defendant's recidivist status is undeniably relevant, it is not singularly dispositive.'"

The trial court concluded, "In reviewing the probation officer's report here, as the court previously indicated, establishes that you have prior convictions for violent crimes. [¶] As I said, you were very fortunate that you haven't suffered serious consequences

legally or physically because of those crimes. In consideration of that, the court finds no ground to strike your prior conviction."

Defendant argues that the trial court abused its discretion in refusing to strike his prior conviction, in that it was eight years old and no one was harmed, the current offense did not involve violence or physical harm to any person, he had only one DUI conviction since the prior conviction, and he has good prospects for rehabilitation.

While the factors set forth by defendant would justify striking defendant's prior conviction, they do not mandate a finding that the trial court abused its discretion in refusing to strike defendant's prior conviction. While defendant had managed to avoid another felony conviction in the eight years since the prior conviction, he still had an anger management problem which caused him to get into trouble. The current offense involved a great deal of violence, albeit to property rather than a person. His claimed good prospects for rehabilitation rest on classes he took while in prison for his prior offense rather than any positive steps taken since his release.

Since the trial court considered all relevant factors in making its decision, it did not act arbitrarily or capriciously in denying defendant's motion to strike his prior conviction. (*People v. Jordan, supra*, 42 Cal.3d at p. 318.) That it might not have been an abuse of discretion to strike defendant's prior convictions under the circumstances does not establish an abuse of discretion in refusing to do so. (*People v. Superior Court (Alvarez), supra*, 14 Cal.4th at pp. 977-978.) On these facts, the trial court did not abuse its discretion in denying his motion to strike his prior conviction. (*Jordan, supra*, at p. 318.)

DISPOSITION

The judgment is affirmed.

JACKSON, J.

We concur:

PERLUSS, P. J.

WOODS, J.